Supreme Court, U.S.
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No. 99-1220

IN THE

Supreme Court of the United States

NOVECON, LTD., NOVECON MANAGEMENT COMPANY and RICHARD W. RAHN,

Petitioners,

v.

BULGARIAN-AMERICAN ENTERPRISE FUND, FRANK L. BAUER and NANCY L. SCHILLER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court will grant certiorari to review a United States court of appeals judgment which affirmed a summary judgment in favor of respondents (defendants below) in a contract and libel action based solely upon the common law of a state[1] with no federal issue being raised, much less an important one;[2] no conflict on any federal issue in any circuit; no suggestion from petitioners that the state law was improperly applied; and no suggestion that the judgment conflicts with any decision by the state court of last resort?

2. Whether, in any event, the district court's alternative holding, that *New York Times v. Sullivan,* 376 U.S. 254 (1964), and its progeny were a sufficient basis to grant summary judgment on the libel claim, was in error?

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1. Following the adoption of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, "[t]he highest court of the District of Columbia is the District of Columbia Court of Appeals." D.C. Code § 11-102. The courts have consistently maintained that from the effective date of the Act, "when interpreting the common law of the District, the U.S. Court of Appeals follows the decisions of the District of Columbia Court of Appeals, which is, for Erie doctrine purposes, treated as if it were the highest court of the state. See D.C. Code Ann. § 11-102." *Rogers v. Ingersol-Rand Co.*, 144 F.3d 841, 843 (D.C. Cir. 1998).

2. The district court had granted summary judgment on two alternative grounds, namely the common law of the District of Columbia as to all claims and this Court's holding in *New York Times v. Sullivan,* 376 U.S. 254 (1964), and its progeny as to the libel claim.

3. Whether the Seventh Amendment is violated when a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is properly granted dismissing an action?

4. Whether the court of appeals was correct in finding that the district court did not abuse its discretion by rejecting petitioners' claims as to Rule 56(f) of the Federal Rules of Civil Procedure?

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STATEMENT OF THE CASE

The Petition for Certiorari misstates the facts and law undergirding this civil action for three contract-related claims (breach of contract, promissory estoppel, and quantum meruit), and a claim for libel.[3] The United States Court of Appeals for the District of Columbia Circuit affirmed a summary judgment dismissing petitioners' complaint pursuant to the common law of the District of Columbia.[4] The district court (per Judge Louis F. Oberdorfer) had granted summary judgment dismissing all claims on the basis of the District of Columbia common law. In addition, the district court also dismissed the libel count on the basis of the First Amendment to the United States Constitution as applied by this Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964) (hereinafter "*New York Times v. Sullivan*"), and its progeny.

At the outset, therefore, one fact is clear. Petitioners hang their argument concerning a federal question on the alternative holding of the district court, not the judgment of the court of appeals below. The court of appeals affirmed

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3. Likewise, the opinions of the court of appeals and district court as reproduced in the Appendix to the Petition are garbled, words are misspelled, sentences are deleted, cases are merged, and in general the opinions as set forth in the Appendix appear not to have been proofread before being filed with this Court. References to the correct opinions below, where the Appendix contains an error, are therefore cited to the Federal Reporter, 3d Series or to the Federal Supplement. Otherwise, when there are no errors, citations will be to Petitioners' Appendix and be preceded by the letter "A".

4. Petitioners do not quarrel with the dismissal of the contract, promissory estoppel, and quantum meruit claims in their Petition for Certiorari.

the dismissal of all claims ***solely*** on the basis of District of Columbia common law and, as to the libel claim, the court of appeals stated:

> The district court dismissed this claim on the basis of both First Amendment and common-law privileges. As we find the common-law privilege sufficient to sustain the dismissal, we do not address BAEF's First Amendment argument.

(A 17).

Petitioners' "Questions Presented" and Petition For Writ of Certiorari therefore are misstatements of the facts and law of this case. They argue as if the First Amendment had been the basis for the court of appeals' decision, which it was not. The court of appeals did not reach the First Amendment arguments relating to the libel claim.[5]

A. The Contract Claims.

This action was originally brought for breach of contract, promissory estoppel, and quantum meruit claims arising out of a failed land project in Sofia, Bulgaria (A 2). The failed

5. The holding of the court of appeals is consistent with the statements of this Court in various contexts that: "If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided." *Alma Motor Co. v. Timken-Detroit Axle Co., et al.*, 329 U.S. 129, 136-37 (1946), citing *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909); *Light v. United States*, 220 U.S. 523 (1911); *Spector Motor Service Inc. v. McLaughlin*, 323 U.S. 101 (1944); *Ashwander v. Tennessee Valley Authority, et al.*, 297 U.S. 288, *reh'g denied*, 297 U.S. 728 (1936) (Brandeis, J., concurring). *See also Hurd v. Hodge, et al.*, 334 U.S. 24 (1948).

project involved the proposed development of a tract of land purchased by the Batsov family in 1895 and seized by the State of Bulgaria in 1954.

In short, petitioners[6] represented that they could provide title to, and zoning for, the project, for which they would receive fees. Petitioner Richard W. Rahn, a well-known economist in both the United States and Bulgaria, is president and CEO of Novecon. Respondent Bulgarian-American Enterprise Fund ("BAEF"), one of the United States Enterprise Funds,[7] was to provide financing and ownership of the project once title to the property was secured by petitioners and transferred to respondent BAEF. Respondent Frank L. Bauer is president and CEO of BAEF while respondent Nancy L. Schiller is BAEF's managing director.

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6. As the district court found, there are two Novecon companies listed as plaintiffs but no distinction has ever been drawn between them. All parties treated them as one in the district court and the court of appeals. Neither the Petition for Certiorari nor this Brief in Opposition treat them any differently. As to petitioner Rahn, no argument in petitioners' brief in the court of appeals dealt with Rahn and no argument was ever made that he was not a limited-purpose public figure.

7. BAEF was created by the United States government pursuant to the Support for East European Democracy Act, 22 U.S.C. §§ 5401, 5402, 5421 ("SEED" Act) (A 2). BAEF is overseen by the United States Congress and the United States Department of State but is controlled by a board of directors composed of distinguished businessmen and other professionals who serve their country without financial compensation. BAEF promotes private sector development and entrepreneurship in Bulgaria through, among other things, grants, loans, and equity investments. (A 2).

All parties had agreed that unencumbered title was required by respondent BAEF before it would proceed with any contractual arrangement and that petitioners would provide the title (A 4-5). Petitioners represented to respondents that restitution of the title to the property by Bulgaria to the Batsov heirs was "just a matter of procedure, does not pose any risks, and is currently underway" (JA 138).[8] In fact, however, title was never restituted. Two Bulgarian courts explicitly denied restitution to the Batsov heirs. Today — almost eight years after the first representations by petitioners — the tract of land still remains the property of Bulgaria. Therefore, even had there been a valid contract, it would have been impossible to perform by petitioners because they could never have produced the title to the land. Moreover, unknown to respondents at the time of petitioners' representations, five of the seven parcels were zoned by Sofia's Master Zoning Plan for a "Park only" and two were zoned by the same Master Plan for a "School only."[9]

B. The Libel Claim.

The following facts were carefully set forth in the court of appeals and district court opinions.

1. Petitioners' first attack: the Executive Branch.

In October 1995, four months after petitioners filed this action for the three contract-related claims, respondents received word from the U.S. Ambassador to Bulgaria,

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8. The letters "JA" preceding reference to a page number refer to pages in the Joint Appendix filed in the court of appeals.

9. The fact that any contract would have been impossible to perform was not addressed by either court below because neither court found that there was even a contract.

William Montgomery, that he had been contacted by petitioners, who gave him a document that generally attacked BAEF's management and contended that "[a]llegations of conflict of interest and theft of project ideas by individuals close to the senior staff have been made." It then offered, as an example of the alleged poor management and operations, the Novecon lawsuit (A 6-7). BAEF considered this to be a draft for publication. (A 7; JA 464). The document also noted that "Rahn has written members of Congress requesting hearings and investigation" of the Fund (A 7).

2. Petitioners' second attack: the Congress.

In November 1995, petitioners sent letters to members of Congress concerning BAEF management, stating:

> [t]here is considerable evidence that [BAEF] has abused its fiduciary responsibility with taxpayer money . . . ; does not have competent management; has conducted its activities in such a way as to give the appearance, if not the fact, of a conflict of interest . . . ; has acted in a manner damaging to legitimate U.S. businesses; and has damaged U.S. Bulgarian relations.

Novecon Ltd., et al. v. Bulgarian-American Enterprise Fund et al., 190 F.3d 556, 562 (D.C. Cir. 1999) (hereinafter "Novecon").

Again, the court of appeals noted — as a result of its extensive review of the record — that petitioners' letters to members of Congress paralleled "the October draft" given to the American Ambassador and offered this case as an example of poor BAEF management. (A 7-8). The court of appeals also pointed out that in closing, petitioners accused BAEF of "incompetence and arrogance" and

"mismanagement or worse," and urged that there should be a congressional investigation into petitioners' charges (A 8).

3. The controversy concerning BAEF management becomes a wide-spread public controversy.

Finally, on January 5-6, 1996, the *Wall Street Journal Europe* published an opinion piece highly critical of BAEF's management (A 8; JA 417). Petitioners admit that the article "focused on mismanagement of U.S. Government funds and oversight by the U.S. Agency for International Development" (Petition at 6). The *Wall Street Journal Europe* article was entitled "AID's Boondoggle in Bulgaria" (A 6). Again, the court of appeals noted that the article "made several of the charges contained in the October draft" given to the State Department and the November letters to various members of Congress. *Novecon, supra,* 190 F.3d at 562. The circulation for the *Wall Street Journal Europe* that day was 64,197 in Europe (JA 1199). Among other things, the article accused BAEF of "arrogance" and "shoddy performance," stemming "largely from a management cadre who spend most of their time drawing big salaries in comfortable offices." *Novecon, supra,* 190 F.3d at 562. It accused the Fund of maintaining a fleet of six cars in Chicago — the actual number was zero — and having spent large sums on computers, furniture, and rent. Four paragraphs of the article dealt with the Novecon lawsuit and noted: "Mr. Rahn, a respected former chief economist at the U.S. Chamber of Commerce, accuses the BAEF of breaching a contract to fund a residential and commercial real estate project in Sofia . . . [by] constantly trying to alter the deal's terms until they caused the project to collapse" (A 8). The article also quoted Ronald Utt, petitioner Novecon's managing director, as stating that BAEF was "in over their heads." *Id.*

The court of appeals noted another parallel between the letters to members of Congress and the *Wall Street Journal Europe* article. Both publications charged that BAEF had sent "four high-priced lawyers into federal court to fight over dubious claims about standing and venue" in the case at bar. *Novecon, supra,* 190 F.3d at 562.

By January 15, 1996, the largest Bulgarian newspaper, *24 Hours,* with a circulation of 236,740 for that day, republished the charges in the *Wall Street Journal Europe* article in two articles without mentioning the *Wall Street Journal Europe* article itself (JA 1135, 1199).[10] Indeed, one article in *24 Hours* quoted "The President of Novecon" in a telephone interview as saying that "This Fund does not defend the interest of Bulgaria at all" (JA 791).

Respondents believed, therefore, that they had no choice but to respond to protect the interests of the Fund. However, when they did, they did so in a most temperate and objective way by including in the package the original critical *Wall Street Journal Europe* article, the letter to the Editor, and the letter complained of.

REASONS FOR DENYING THE WRIT

The opinion of the court of appeals is based solely on the common law of the District of Columbia and nowhere do Petitioners claim that the court of appeals misapplied the District of Columbia common law.[11] No federal question,

10. This publicity was followed four days later by the charges being repeated in two articles in another Bulgarian newspaper, *Standart,* with a circulation of 53,839 for that day (JA 1135).

11. As this Court has pointed out, "[w]hat was ruled by the Court of Appeals . . . was not specified as error in the petition for the writ, and will be assumed to be correct." *Prudence Co., Inc. v. Fidelity & Deposit Co. of Maryland,* 297 U.S. 198, 208 (1936).

much less an important one, has been presented to justify the granting of the petition. No federal statute is involved. Petitioners do not argue that the District of Columbia common law was incorrectly applied by the court of appeals. And, referencing Rule 10 of this Court, there are no allegations that the court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" (Sup. Ct. R. 10).

Petitioners' other arguments concerning issues arising under *New York Times Co. v Sullivan* and its progeny are simply not relevant here. Their arguments concerning discovery and the Seventh Amendment are likewise in error. The petition for a writ of certiorari should be denied.

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE COMMON LAW OF THE DISTRICT OF COLUMBIA IN GRANTING RESPONDENTS SUMMARY JUDGMENT.

This action was commenced by petitioner Novecon against BAEF on June 21, 1995 for contract fees, promissory estoppel, and quantum meruit (A 6). The complaint was later amended to include a claim for libel. Respondents moved for summary judgment in the district court on October 1, 1996 (JA 372). In two orders, the district court, after correctly noting that "the parties have engaged in discovery for close to a year" (A 74, n.1), granted the motion for summary judgment.

As to the libel count, the district court made clear that the dismissal was on alternative and independent grounds: first, that two District of Columbia common-law qualified privileges existed as a matter of law,[12] and there was absolutely no evidence of common-law malice, as defined by the Courts of the District of Columbia, to defeat the privileges. The district court, citing D.C. Court of Appeals cases, concluded:

> Here, BAEF's interest in defending its business reputation before U.S. government agencies, Bulgarian officials, and actual and potential business relations within the Bulgarian private sector is manifest. The foregoing facts demonstrate that plaintiffs themselves stimulated the interests of the governmental, media, and commercial parties who received defendants' allegedly defamatory communication. Plaintiffs initiated the lawsuit. It was they who went public with it, their account embellished by derogatory remarks about defendants generally.

Novecon Ltd., et al. v. Bulgarian-American Enterprise Fund, et al., 977 F. Supp. 45, 49-50 (D.D.C. 1997).

Second, the district court found that petitioners were limited-purpose public figures and that there was no evidence of malice as defined by this Court in *New York Times v. Sullivan* and its progeny.

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12. These two common-law qualified privileges are the qualified privilege of reply or self defense and the qualified privilege afforded publication to persons having a common interest in the subject matter.

As pointed out above, the court of appeals affirmed the summary judgment on all claims on the basis of the District of Columbia common law. As to the dismissal of the contract claims, the court of appeals reviewed District of Columbia case law and concluded:

> In sum, we agree with the district court that no reasonable trier of fact could conclude that the exchange of communications between Novecon and BAEF constituted an agreement by both parties to be bound by their terms. Rather, the letters were "merely a part of the preliminary negotiations looking toward the execution of a contract in writing and by [their] own terms negate[d] the idea that [they] were intended as an offer which thereafter could be accepted . . . without the necessity of a formal written document covering all the terms." *Simplicio v. National Scientific Personnel Bureau, Inc.*, 180 A.2d 500, 502 (D.C. 1962).

Novecon, supra, 190 F.3d at 565.

As to the libel claim, the court of appeals analyzed the applicable District of Columbia law and explained why affirmance of the district court was warranted.

A. The court of appeals correctly determined that under the District of Columbia common law the existence of a privilege is a question of law for a court.

First, the court of appeals recognized that in the District of Columbia, as elsewhere, the application of any privilege in a libel action is a question of law for the court. The court

of appeals cited *Columbia First Bank v. Ferguson*, 665 A.2d 650 (D.C. 1995); *Altimont v. Chatelain, Samperton & Nolan*, 374 A.2d 284 (D.C. 1977); and *Mosrie v. Trussell*, 467 A.2d 475 (D.C. 1983), for this well-known proposition.

B. The court of appeals correctly found that the qualified privilege of reply or self defense and the privilege based on a common interest in the subject matter exist in the District of Columbia.

Second, the court of appeals found that the common-law privilege of self defense or reply (A 17) and the privilege of publication to persons having a common interest in the subject matter (A 18, n.5) are both recognized under the District of Columbia common law. It stated:

> The District of Columbia recognizes "self defense" as a qualified privilege constituting a complete defense to a claim of libel or defamation. *See Mosrie v. Trussell*, 467 A.2d 475, 477 (D.C. 1983); *Dickins v. International Bhd. of Teamsters*, 171 F.2d 21, 24 (D.C. Cir. 1948). "When the author of a libel writes . . . for the protection of his own rights or interests, that which he writes is a privileged communication unless the writer be actuated by malice." *Dickins*, 171 F.2d at 24.
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> * * *
>
> There is no question but that the privilege applies in this case. BAEF and its management had been subjected to serious attacks in letters to Congress and articles in the press, and were privileged to respond to those attacks in self defense. Thus, "the

> dispositive issue in this case, as in most cases involving an assertion of qualified privilege, is whether there has been sufficient evidence of malice to overcome the privilege." *Columbia First,* 665 A.2d at 656. The burden of proof to make that showing rests on the plaintiff. *Mosrie,* 467 A.2d at 477; *Altimont,* 374 A.2d at 290 (footnote omitted).

Novecon, supra, 190 F.3d at 566-67.

Likewise, as to the defense afforded publications to persons having a common interest in the subject matter, the court of appeals carefully pointed out:

> To be protected by that privilege, "the statement must have been (1) made in good faith, (2) on a subject in which the party communicating has an interest . . . , (3) to a person who has such a corresponding interest." *Moss v. Stockard,* 580 A.2d 1011, 1024 (D.C. 1990). For essentially the same reasons discussed below, those requirements are satisfied here. BAEF made the statement in the good-faith belief that it was necessary to protect the interests of the Fund from what it saw as a false and potentially damaging attack on its reputation for fair dealing, and sent it to those with either an interest in or business dealings with the Fund.

Id. at 566, n.5.

C. The court of appeals correctly found that common-law malice in the District of Columbia is strictly construed and the publication must be solely from express malice with no other motivation possible.

Third, the court of appeals then noted that while malice is necessary to overcome a qualified privilege, "District of Columbia law makes it very difficult to overcome a qualified privilege" (A 18). Indeed, the D.C. Court of Appeals has held that when the statement complained of is published on a privileged occasion, there is a presumption that malice does not exist, *viz*:

> [T]he declarant "will be presumed to have been actuated by pure motives in its publication." *Ashford v. Evening Star Newspaper Co.*, 41 App. D.C. 395, 405 (1914), and the plaintiff therefore has the burden of proving that the declarant acted with malice. *Ford Motor Credit Co., supra,* 367 A.2d at 1314.

Columbia First Bank, supra, 665 A.2d at 656.

The court of appeals, however, did not stop there. The court explained that under District of Columbia common law, actual malice means express malice:

> Common-law malice . . . "emphasize[s] bad faith and evil motive." [citing *Moss v. Stockard,* 580 A.2d 1011, 1026, n.29 (D.C. 1990)]; *see Mosrie,* 467 A.2d at 477. It is "the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as

> to constitute ill will." *Moss,* 580 A.2d at 1025; *Mosrie,* 467 A.2d at 477. And "unless the statement itself is 'so excessive, intemperate, unreasonable, and abusive as to forbid any other reasonable conclusion than that the defendant was actuated by express malice,' malice must be proven by extrinsic evidence." *Moss,* 580 A.2d at 1024 quoting (*Ford Motor Credit Co. v. Holland,* 367 A.2d 1311, 1314 (D.C. 1977)); *see Columbia First,* 665 A.2d at 656.

Novecon, supra, 190 F.3d at 567.

D. The court of appeals correctly found that under the District of Columbia common law, if there are motivations for the publication other than express malice, then there is no jury question and the action is to be dismissed.

Fourth, the court of appeals noted that if any proper purpose for the publication other than malice exists, then there can be no express malice as a matter of D.C. common law and nothing is left to the jury. The court cited three important D.C. Court of Appeals cases in this regard, namely: *Mosrie, supra*; *Columbia First Bank, supra*; and *Altimont, supra.*

The court of appeals reviewed the standards set by the D.C. Court of Appeals for finding a vitiating form of malice. It noted that the mere existence of ill will on the part of the publisher, or the fact that the publisher enjoyed defaming the plaintiff or felt resentment and indignation toward the plaintiff, is insufficient to prove express malice. After examining District of Columbia law, the court of appeals stated:

"[T]he mere existence of ill will on the part of the publisher toward the subject of the publication does not defeat the publisher's privilege if the privilege is otherwise established by the occasion and a proper purpose." *Mosrie*, 467 A.2d at 477. Rather, the "court looks to the primary motive by which the defendant is apparently inspired; and, the fact that he feels resentment and indignation towards the plaintiff and enjoys defaming him will not forfeit the privilege so long as the primary purpose is to further the interest which is entitled to protection" *Id.* at 477-78; *see Columbia First*, 655 A.2d at 656. Most significantly,

> if the language of the communication and the circumstances attending its publication by the defendant are as consistent with the nonexistence of malice as with its existence, there is no issue for the jury, and it is the duty of the trial court to direct a verdict for the defendant.

Mosrie, 467 A.2d at 478 (quoting *National Disabled Soldiers' League, Inc. v. Haran*, 4 F.2d 436, 441-42 (D.C. 1925)); *see Altimont, supra*, 374 A.2d at 291; *Dickins*, 171 F.2d 21 at 25.

Novecon, supra, 190 F.3d at 567.

E. The court of appeals correctly determined that there was a legitimate basis for defendants' letter thereby negating express malice under District of Columbia common law.

Fifth, the court of appeals noted that "we cannot deduce the necessary malice from BAEF's words alone" (A 20). First, the court of appeals analyzed the District of Columbia cases and held that if there is any legitimate justification for the publication complained of, the issue becomes a matter for the court. The court of appeals, after finding that the language used mandated a dismissal under District of Columbia law, stated:

> [H]ere the word "extort" was used as "a vigorous epithet" by "those who considered" Novecon's litigating position "extremely unreasonable." And there can be no question that BAEF actually believed that Novecon's litigating position — its claims that BAEF had breached a binding contract and so should pay it $200,000 — was unreasonable. BAEF vigorously defended itself against Novecon's contract claim in the district court, and we have upheld that defense. Accordingly, we cannot find that BAEF's choice of epithets " 'forbid[s] any other reasonable conclusion than that the defendant was actuated by express malice.' " (*Moss*, 580 A.2d at 1024 (quoting *Ford Motor*, 367 A.2d at 1314)).

Novecon, supra, 190 F.3d at 568-69.

The court of appeals reviewed the language complained of and stated that while the words were perhaps harsh, they

were not of the degree required by the District of Columbia courts for a finding of malice in the District of Columbia. In fact, after making its analysis, the court of appeals stated that "statements the District of Columbia Court of Appeals found protected by the self-defense privilege in *Mosrie v. Trussell* were at least as harsh and intemperate as those at issue here." The use of the word "extort" does not change this conclusion and in fact, in context, is mere rhetorical hyperbole. This Court and others have repeatedly found that bringing a meritless action is considered to be a form of extortion.[13] Moreover, the court of appeals believed that the

13. For example, as this Court pointed out per Burger, C.J., in dealing with the application of Rule 23 of the *Federal Rules of Civil Procedure*: "District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979). In concurring in *Reiter*, Justice Rehnquist stated: "And pronouncements from this Court exhorting district courts to be 'especially alert to identify frivolous claims brought to extort nuisance settlements' will not be a complete solution."*Id.* at 345. Justice Thurgood Marshall pointed out in his dissent in *Sedima S.P.R.L v. Imrex Co., Inc.*, 473 U.S. 479 (1985), "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is not surprising that civil RICO has been used for extortive purposes." *Id.* at 506. Future Justice Breyer in *Natasha, Inc. v. Evita Marine Charters, Inc.*, 763 F.2d. 468, 471 (1st Cir. 1985), discussed how the American system requires each party to pay its own attorney and noted:

> It may encourage plaintiffs to bring "strike suits" — suits that have no legal merit but which a plaintiff hopes the defendant will settle by paying the plaintiff something less than what it would cost to defend the suit. See generally Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371, 86 S. Ct. 845, 850, 15 L. Ed. 2d 807 (1966) ("strike suits" filed by parties "interested in getting quick dollars by making charges without regard

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> to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them"); Note, Extortionate Corporate Litigation: The Strike Suit, 34 Colum. L. Rev. 1308 (1934).

Lower courts have used the same language in cases too numerous to detail. For example: "[I]t is well known that frivolous class actions can sometimes extort sizeable settlements from the defendants." *Jones Motor Co., Inc. v. Holtkamp, Liese, Beckemeier & Childress, P.C.*, 197 F.3d 1190, 1193 (7th Cir. 1999); in referring to the decline of breach of promise actions, the Seventh Circuit explained that one reason is "the unfounded use of the suit . . . to extort out-of-court settlements." *Wildey v. Springs*, 47 F.3d 1475, 1479 (7th Cir. 1995); "Suits that are frivolous or groundless are true nuisances; indeed, they are sometimes thinly disguised forms of extortion, the kinds of activities that courts ought, for obvious reasons, not to encourage." *Tyler v. Corner Construction Corp. Inc.*, 167 F.3d 1202, 1206 (8th Cir. 1999); "Crampton was not content to allow her suit to die on the vine. Rather, she kept it alive, hoping to extort a nuisance-value settlement. . . . the willful continuation of a suit known to be meritless." *Edwards v. General Motors Corp.*, 153 F.3d 242, 247 (5th Cir. 1998); "Every frivolous suit requires time and attention and diverts the court from those matters which deserve its attention. . . . The plaintiff herein . . . if he continues to utilize the judicial system as a means to harass and extort, he can expect to face further severe sanctions." *Becker v. Sherwin Williams*, 717 F. Supp. 288, 290 (D.N.J. 1989);

> Apparently dissatisfied with Rule 9(b)'s failure to prevent abuse of the private securities laws by attorneys allegedly anxious to extort settlements generally "based not on the merits but on the size of the defendant's pocketbook," Congress amended the Securities Exchange Act of 1934 by enacting the Private Securities Litigation Reform Act of 1995.

Sheldon v. Vermonty, 31 F. Supp. 2d 1287, 1291 (D. Kan. 1998).

statement at issue was quite close to that considered by this Court in *Greenbelt Cooperative Publishing Assoc. v. Bresler,* 398 U.S. 6 (1970), in which this Court held that as a matter of constitutional law, the use of the word "blackmail" in the particular circumstances was not defamatory. Such is the case at bar.

However, respondents did not move for a summary judgment on the basis of truth or failure to state a claim, although they could have done so. They based their motion on the ground of privilege. In publishing their letter, respondents believed — and they still believe — that the contract action was completely without merit and was brought only to extort a settlement. When respondents wrote the letter, they knew that two Bulgarian courts had refused restitution of the title (JA 1191-93). This is the basis of the alleged libel. And here, both the district court and the court of appeals have agreed with respondents that the contract claims ***were*** meritless.

The court of appeals then turned to whether the letters were published on a privileged occasion. After a review of the facts and the law in this case, the court of appeals concluded, applying District of Columbia common law, that:

> Because no reasonable fact finder could find that "the language of the communication and the circumstances attending its publication by the defendant" were not at least "as consistent with the nonexistence of malice as with its existence, there is no issue for the jury." *Mosrie,* 467 A.2d at 478 (quoting *National Disabled Soldiers,* 4 F.2d at 441-42); *see Altimont,* 374 A.2d at 292. It therefore was "the duty of the trial court to direct a verdict for the defendant" on Novecon's claim of defamation. *Mosrie,* 467 A.2d at 479.

Novecon, supra, 190 F.3d at 570.

Petitioners argue that sending the letter to 570 carefully selected persons somehow raises an issue of fact concerning malice (Petition at 7). The court of appeals and the district court met this issue head-on. The court of appeals stated:

> The district court disagreed, as do we. As the court said, "the common law qualified privilege asserted here does not demand that defendants demonstrate failsafe precision in identifying third parties with a sufficient interest in BAEF's public controversy." 977 F. Supp. at 50.[8]
>
> [8] The Restatement (Second) of Torts states:
>
> If on an occasion giving rise to a conditional privilege the publisher mistakenly communicates the defamatory matter to some person to whom he is not otherwise privileged to publish it, he is protected if . . . he reasonably believes that the person to whom he communicated it is a person whose knowledge of the matter would be useful in the protection of the interests in question.
>
> Restatement (Second) of Torts § 604 cmt. e (1977) (quoted in *Novecon II*, 977 F. Supp at 50).
>
> BAEF sent its letter to "U.S. government agencies, Bulgarian officials, and actual and potential business relations within the Bulgarian private sector." *Id.* at 49. Specifically, the Fund

"attempted to reach persons whose opinions of BAEF were, or reasonably could have been, affected by plaintiffs' comments and the ensuing wave of negative publicity." *Id.* at 50. Approximately five hundred of the letters went to Bulgaria, with all but a handful of those going to borrowers from the fund. Bauer Aff. ¶ 91 (J.A. 472); Schiller Aff. ¶ 59 (J.A. 726). BAEF could not limit itself to readers of the *Wall Street Journal,* because the Rushford article had been republished in the Bulgarian press and Novecon had sent its own letters directly to members of Congress. As the district court explained, "defendants mailing to several hundred addresses must be viewed in light of the negative press coverage BAEF received in Bulgarian and international newspapers, reaching tens of thousands of readers." 977 F. Supp. at 55-56. *Compare Dickins,* 171 F.2d at 23-25 (finding no showing of malice where Teamsters' union responded to critical newspaper articles by attacking critics in teamsters magazine sent to "400,000 Teamsters and about 1,200 others, including all members of Congress, a number of colleges, libraries, newspapers and other periodicals").

Novecon, supra, 190 F.3d at 569-70.[14]

14. When *Dickins* was issued in 1948, the "decisions of the United States Court of Appeals . . . constitute[d] the case law of the District of Columbia." After February 1, 1971, the new District of Columbia Court of Appeals stated that "[a]s a matter of internal policy, we have adopted the rule that no division of this court will overrule . . . or refuse to follow a decision of the United States Court (Cont'd)

Respondents believed that they had no choice but to send the letters, and, as pointed out above, they sent them along with the original critical *Wall Street Journal Europe* article, the letter to the Editor, and the letter complained of. As respondent Schiller pointed out:

> The second matter that I remember is how hard Mr. Bauer, Ms. Rollins, and I worked to winnow down the list of the recipients to those who either knew about the controversy that Dr. Rahn seemed obviously to have generated or who would know about it eventually. It should be pointed out that the *Wall Street Journal Europe* and Bulgarian newspaper articles probably went to tens if not hundreds of thousands of readers. The letter I participated in writing went to 70 persons in the United States and only the Fund's borrowers and a small group in Bulgaria. I had no intent to injure Dr. Rahn but indeed we sent both sides of the controversy to the addressees. I had no malice towards Dr. Rahn but sent the letter to those individuals whom I believed had a common interest in the subject matter.

(JA 726).

Moreover, as both courts pointed out, the test is whether defendants believed that the extent of publication was needed, not whether some person was erroneously included in a category (A 25 n.8).

(Cont'd)
of Appeals rendered prior to February 1, 1971, and that such result can only be accomplished by this court en banc." *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) (footnote omitted).

Therefore, because the court of appeals found good motivation for the letter, under the District of Columbia common law, there was no issue for the jury and summary judgment was properly granted.

II.

THE DISTRICT COURT CORRECTLY APPLIED THE FIRST AMENDMENT SAFEGUARDS BY GRANTING RESPONDENTS SUMMARY JUDGMENT.

Even if this Court wishes to review this case in the context of *New York Times v. Sullivan*, the district court correctly applied the law. The district court found that petitioners were limited-purpose public figures and that respondents did not act out of actual malice as defined by that landmark case and its progeny. It is not correct,as petitioners imply, that the district court found that petitioners had "achieved celebrity status"(Petition at 6).

III.

THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

There is no conflict on the issues raised in the instant case among the circuit courts of appeal. The purported conflict raised by petitioners is simply a variance among state laws. In casting about to find a federal issue, petitioners argue that "the question of whether there is a distinction between the First Amendment rights of a party who is part of the media and a non-media or private party have not been clearly resolved by this Court" (Petition at 5). Whatever the merits of this argument are, it is

not raised in this case by the court of appeals, which did not deal with the First Amendment considerations. Thus, no conflict exists among the circuits. Petitioners' attempt to argue that there is a conflict, based on *Swengler v. ITT Corp.*, 993 F.2d 1063 (4th Cir. 1993), merely underscores what this Court has long held:

> As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.

Ruhlin, et al. v. New York Life Ins. Co., 304 U.S. 202, 206 (1938).

The Fourth Circuit Court of Appeals in *Swengler* refused to dismiss a libel action between private parties on the basis that "[u]nder Virginia law, 'actual malice' is not a substantive element of defamation per se when the claim 'involv[es] a non-media defendant.' " *Swengler, supra,* 993 F.2d at 1071, n.5, quoting *Great Coastal Express v. Ellington,* 230 Va. 142, 334 S.E.2d 846, 851 (1985). Here, the District of Columbia law applies. And in the District of Columbia, the law is settled that the law of libel should apply to nonpublic figure plaintiffs confronting both media and nonmedia defendants. *See Vereen v. Clayborne,* 623 A.2d 1190, 1194-95 (D.C. 1993); *Moss v. Stockard,* 580 A.2d 1011 (D.C. 1990).

IV.

THE NEED FOR DISCOVERY IS A PRETEXT AND AN ATTEMPT TO MISLEAD THE COURT.

This action was filed on June 25, 1995. On July 24, 1996, over one year after the original complaint was filed, petitioners completed all of the discovery they ever noticed in this action

by demanding the production of every document in respondents' possession (JA 377-83). Respondents fully complied. Respondents moved for summary judgment on October 1, 1996, one year and three months after commencement of this action. As the district court noted: "Here, the parties have engaged in discovery for close to a year" (A 74 n.1).[15]

Petitioners utterly failed to meet the requirements of Rule 56(f), which requires affidavit proof setting forth why the party cannot present by affidavit the facts essential to justify the party's opposition. The wisdom of this requirement is underscored in the instant case because the allegations in the Petition are raised here for the first time, are false, and are not part of the record (Petition at 9).[16] However, the district court did discuss the merits of petitioners' argument relying on case law in the District of Columbia Circuit that excuses the absence of a Rule 56(f) affidavit if other documents filed by a party serve as the functional equivalent of an affidavit. The district court found not only that discovery had been available to

15. The district court did halt discovery on July 24, 1996, but only for six weeks so that counsel for respondents could travel to Bulgaria to complete the preparation of the motion for summary judgment. During this time, respondents were required to produce all documents demanded by petitioners, which was done. It is simply mendacious to argue that "plaintiffs, however, were denied the right to test the credibility of Bauer's affidavit by deposition because the trial court stayed discovery" (Petition at 9).

16. It is simply not true, as petitioners now allege, that "[b]oth Novecon, a private entity, and BAEF, a U.S. Government funded entity, were vying for business credibility in Bulgaria and competing for approval by the U.S. State Department in aiding the Bulgarians in an economic revival." (Petition at 9). Such an allegation was never raised below, is not true, and is belied by the fact that BAEF is a financial institution and petitioners are known in Bulgaria for importing Speedo bathing suits and "L.A. Gear" sports clothing.

petitioners for over one year and that they had engaged in it, but also that further discovery would have availed petitioners nothing (A 74-78).

The court of appeals affirmed the district court on the basis that "we cannot dispute the district court's conclusion that production of the names was not — as required by Rule 56(f) — 'essential to justify [Novecon's] opposition' to summary judgment. *Id.* at 54, 55-56" (A 26).

Under these circumstances, this Court has refused certiorari in the past. In *Appalachian Power Co., et al. v. American Institute of Certified Public Accountants, et al.*, Mr. Justice Brennan stated:

> [O]rdinarily an application by a District Court of the Rules of Civil Procedure when affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts.

80 S. Ct. 16, 18 (1959) (Per Justice Brennan, as Circuit Justice).

V.

PETITIONERS' SEVENTH AMENDMENT ARGUMENT IS WITHOUT MERIT.

Petitioners' Seventh Amendment argument does not reflect the law. Petitioners argue that:

> If Rule 56 is not violated in this case then there has been an intrusion into the province of the jury in violation of the Seventh Amendment to the Constitution. The Seventh Amendment guarantees

> the right to a jury trial in civil cases. Summary judgment cannot be used as a substitute for trial by jury. Yet in this case that is what occurred.

(Petition at 10).

This argument is meritless. As long as Rule 56 is properly applied, a losing party is not deprived of his Seventh Amendment rights. It is long-settled law that the summary judgment procedure does not violate the Seventh Amendment. This issue was first addressed by this Court in 1902 regarding a challenge to the District of Columbia's summary judgment rule in *Fidelity & Deposit Co. of Maryland v. U.S. ex rel. Smoot,* 187 U.S. 315 (1902). This Court stated:

> There is but one element in this contention, — the right of a jury trial . . . In Smoot v. Rittenhouse, *supra,* the validity of the rule was sustained, as well as the power of the court to make it. If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

Id. at 319-20.

Furthermore, the vigorous language of this Court in *In re Peterson,* 253 U.S. 300 (1920), can leave no doubt that the summary judgment procedure provided in Rule 56 does not infringe the constitutional right to trial by jury. In that case, the action had been referred to an auditor who simplified the issues

and wrote a report. The report was read to the jury as *prima facie* evidence. Concerning the claim that this procedure infringed on the Seventh Amendment, this Court said:

> The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. It does not prohibit the introduction of new methods for determining what facts are actually in issue nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. . . .
>
> In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. **No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined.**

Id. at 309-10 (emphasis supplied) (citations omitted).

In affirming the use of offensive collateral estoppel, Justice Stewart wrote:

> The Seventh Amendment has never been interpreted in the rigid manner advocated by the petitioners. On the contrary, many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment. See Galloway v. United States, 319 U.S. 372, 388-393 (directed verdict does not violate the Seventh Amendment); Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 497-498 (retrial limited

> to question of damages does not violate the Seventh Amendment even though there was no practice at common law for setting aside a verdict in part); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-321 (summary judgment does not violate the Seventh Amendment).

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336 (1979) (footnote omitted). *See also Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967) (judgment notwithstanding verdict does not violate right to jury trial); *Dimick v. Schiedt*, 293 U.S. 474 (1935) (permitting remittitur but not additur in federal court actions).[17] [18]

In sum, petitioners' Seventh Amendment arguments have been rejected by this Court and all other federal and state courts since this Court first dealt with the issue in 1902.

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17. The two cases cited by petitioners offer no support for their argument. In the dissent in *Parklane Hosiery Co. v Shore*, Mr. Justice Rehnquist restated support for *Neely; Galloway v. United States*, 319 U.S. 372 (1943); *In re Peterson;* and *Schiedt*. Likewise, in *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), this Court held only that a combination of equity claims and law claims cannot deprive a party of its right to a jury trial.

18. *See also City of Chanute, Kansas v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir.), *cert. denied*, 506 U.S. 831 (1992); *Plaisance v. Phelps*, 845 F.2d 107 (5th Cir. 1988); *Davis v. United States*, 742 F.2d 171 (5th Cir. 1984); *Barber v. Kimbrells, Inc.*, 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978); *In the Matter of Diamond Door Company v. Lane-Stanton Lumber Co.*, 505 F.2d 1199 (9th Cir. 1974); *Caparaso v. CIR*, 907 F. Supp. 1235 (N.D. In. 1995); *Shabazz v. Odum*, 591 F. Supp. 1513 (M.D. Pa. 1984); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 3d § 2714; *Moore's Federal Practice*, 3d § 56.12.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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